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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DONTE DREW, Defendant and Appellant.	B287928 (Los Angeles County Super. Ct. No. VA144823)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul Anthony Sahagun, Judge. Remanded and Affirmed.

The Law Office of B.C. McComas and Brian C. McComas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Donte Drew of stalking (Pen. Code, § 646.9, subd. (a);[1] count 1); first degree burglary (§ 459; count 7), and five misdemeanor counts, four counts of peeking (§ 647, subd. (i); counts 3-6) and one of aggravated trespass (§ 602.5, subd. (b)); count 2.) He admitted a prior conviction of assault with a firearm as both a prior serious felony conviction (§ 667, subd. (a)(1)) and a strike under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court sentenced him to a term of 18 years 4 months. On appeal he contends that section 654 precludes separate punishment on his stalking conviction, and that the case must be remanded for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. We disagree with the first contention, but agree with the second. Therefore, we remand the case, but otherwise affirm.

BACKGROUND

I. *Prosecution Evidence*

A. *Stalking (Count 1) and Burglary (Count 7)*

Jessica M. lived in an apartment triplex with her mother and 11-year-old brother. One afternoon in April 2017, while walking home from the Dollar Tree Store a short walk from her apartment, she noticed appellant following her as she entered an alley. He followed her all the way home. In fear, she ran into the back gate of her complex so he would not see which was her apartment.

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[1] All undesignated section references are to the Penal Code.

A couple of weeks later, as she was at home watching television with her brother, he told her to look out the window. When she did, she noticed a man peeking through the window. Jessica went to the door and opened it to look outside, but the man was gone.

Two weeks after that, Jessica saw appellant peeking into her window. When Jessica went outside, she saw appellant running away. She called the police, but appellant was not found.

Once again, about two weeks later, Jessica observed appellant looking into the window of her apartment, and ran outside. This time, appellant did not flee. She asked him if he lived in the complex, and appellant said he did not. Then she asked him what he was doing there. Pretending to be on his phone, appellant said he was waiting for someone. Jessica told him not to look in other people's windows, and to leave or she would call the police.

Appellant became angry, and approached. Jessica pulled out her phone to call the police. Appellant said, "I know you were the one. You always been the one." Because she was really "freaked out," Jessica yelled as she called the police. Appellant finally ran away. By the time the police arrived, he was gone.

Two weeks later, around 5:00 a.m. on May 11, 2017, Jessica was asleep in bed when she awoke to find appellant in her bedroom. Jessica yelled, "What are you doing here? Get out." As she screamed, appellant moved closer and motioned her to be quiet. When she told him to get out, appellant replied, "I thought you were my friend." She continued to scream. Her brother, who was asleep on the floor, woke up and also started screaming. Taking notice of the boy, appellant turned around

and went out the window, taking the window screen with him. Jessica called the police. The entire experience made Jessica very afraid, and her fear continued even after she heard that appellant had been arrested.

B. *Misdemeanor Peeking and Trespass*

During the same time period in which he repeatedly went to Jessica's home, appellant was also lurking on the property where Rassam Elasmar, his wife, and five daughters lived. According to Elasmar, and as depicted by security video from security cameras at his home, on at least four occasions between February and April 2017, appellant was seen peeking into windows, checking door knobs, and (on one occasion) tampering with a bedroom screen on the window of one of Elasmar's daughters' bedroom.

II. *Defense Case*

Appellant testified that he was homeless and addicted to methamphetamine and alcohol. He consumed both daily. He did not recognize Jessica and did not remember any of the events she described. He believed he was under the influence of methamphetamine and alcohol that day. He recognized himself as the person in the videos played during Elasmar's testimony, but did not remember being there.

Appellant's aunt, Damara Hill, had known appellant since he was born. According to Hill, appellant became homeless three years earlier. Although she never saw him take drugs, she was aware he was using intoxicants.

DISCUSSION

I. *Section 654*

Appellant contends that section 654 precludes separate punishment on the stalking count. We disagree.

In count 7, appellant was charged with having committed first degree burglary of Jessica's residence on or about May 11, 2017. The jury instruction on burglary required that to convict appellant, the jury had to conclude that "[w]hen he entered [Jessica's residence], he intended to commit the crime of Stalking."

In count 1, appellant was charged with stalking Jessica during the period between April 1, 2017 and May 11, 2017. The jury was instructed that to convict appellant, the prosecution had to prove that "[t]he defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed" Jessica, and that he "made a credible threat with the intent to place [her] in reasonable fear for . . . her safety or . . . the safety of . . . her immediate family."

In his closing argument to the jury, the prosecutor's theory of stalking relied on appellant's pattern of conduct that culminated in the burglary, and on his implicit threat of violence inherent in the circumstances of the burglary. The prosecutor argued: "So [Jessica] was afraid and because of his conduct she was in fear that he was [going to] harm her and that's obvious. Somebody is following you, somebody is peeking in your property and they're in your bedroom, yeah. You're [going to be] wondering and thinking, um, I think they have no good intentions here. They're [going to] harm me one way or

another. . . . So, here, the threat is the pattern of the conduct. The fact that he follows her and he is now going back to her house multiple times and obviously climbing into her bedroom, that's all a pattern of conduct that satisfies the element that a credible threat [of violence] was made."

With respect to the burglary, the prosecutor argued that appellant's intent in entering Jessica's residence overlapped with the stalking: "All the elements of stalking that you have, so long as you're satisfied, if you believe when he entered he was intending to commit the stalking, that's a burglary right there. . . . He doesn't even have to actually commit the stalking. We don't have to prove that he actually was stalking her at that moment. . . . The People's position is that he, in fact, committed the stalking upon entering, but if he would have entered and she just happened to be sleeping on the couch, he still intended to stalk her by entering into the room."

At sentencing, the court imposed sentence on the burglary as the principal count. With respect to the stalking, the court (without elaboration) found that it "occurred on a separate occasion, was an independent act, and will sentence the defendant to a consecutive term."

We conclude that the trial court's determination that appellant's stalking conviction was a separate act for purposes of section 654 was supported by substantial evidence. "Section 654 '"literally applies only where [multiple] punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, . . . its protection has been extended to cases in which there are several

offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]'" [Citation.] As explained by our Supreme Court in *People v. Britt* (2004) 32 Cal.4th 944, 951–952: "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." [Citation.] A decade ago, we criticized this test but also reaffirmed it as the established law of this state. [Citation.] We noted, however, that cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted.'" (*People v. Phung* (2018) 25 Cal.App.5th 741, 759-760.)

"Under section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935 (*Gaio*).)

Whether a defendant's course of conduct is divisible is determined under all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it. (*People v. Goodall* (1982) 131

Cal.App.3d 129, 147-148.) Further, it is important to note that the trial court is not bound by the jury's verdict in making this determination, and that the standard of proof required for a determination under section 654 is a preponderance of the evidence, not proof beyond a reasonable doubt. (*In re Coley* (2012) 55 Cal.4th 524, 557 [in sentencing a defendant on an offense of which he or she has been convicted, trial court may take into account the court's own factual findings with regard to the defendant's conduct related to an offense of which the defendant has been acquitted, so long as the trial court properly finds that the evidence establishes such conduct by a preponderance of the evidence].)

Here, the trial court could reasonably conclude for sentencing purposes that appellant's commission of stalking was a separate, completed crime before the burglary, and thus not subject to section 654. "The first element of stalking is 'willfully, maliciously, and repeatedly follow[ing] or willfully and maliciously harass[ing] another person.' (§ 646.9, subds. (a), (g).) . . . [¶] The second element is 'mak[ing] a credible threat,' which includes a threat implied by a pattern of conduct or a combination of verbal and written communicated statements and conduct. (§ 646.9, subd. (g).) . . . [¶] The third element of stalking is intending to place the victim in reasonable fear for his or her safety." (*People v. Uecker* (2009) 172 Cal.App.4th 583, 594-595.) The victim must actually have been in fear and that fear must be reasonable. (*People v. Carron* (1995) 37 Cal.App.4th 1230, 1238.) "'"[T]he entire factual context, including the surrounding events and the reaction of the listeners, must be considered."' [Citation.] . . . [A] court 'cannot ignore what a victim

knows about a defendant, regardless of how it is learned, in assessing whether a defendant's behavior rises to the level of a credible threat.' [Citation.]" (*People v. McPheeters* (2013) 218 Cal.App.4th 124, 138.)

As to the first element of stalking, here the evidence clearly supports a finding that appellant willfully and maliciously harassed Jessica. At approximate two-week intervals he (1) followed her home from the Dollar Tree Store, (2) peeked into her window while she was watching television with her brother and fled, (3) again peeked into her window and fled, and (4) again peeked in her window, resulting in a confrontation with Jessica.

The evidence also supports that appellant made a credible threat with the intent to place Jessica in reasonable fear for her safety, and that Jessica was reasonably in such fear. On the last occasion of peeking mentioned above, Jessica observed appellant looking into the window of her apartment with his hands shielding his eyes. She ran outside. For the first time, appellant did not flee. Jessica asked him if he lived in the complex. When he said he did not, she asked him what he was doing there. He said he was waiting for a friend, and pretended to be on his phone. Jessica told him not to look in other people's windows, and to leave or she would call the police. Appellant refused, and repeated that he was just waiting for his friend. According to Jessica, he then "started acting all . . . weird." She again told him to leave, and he "would just stand there." Jessica "got really uncomfortable because he was really close to my door and my window and there was just me and my brother alone in the house at the time." When she told him she was going to call the police, "he started walking

like a little bit closer" to her, coming within about four steps. Jessica pulled out her phone said she was going to call the police unless he left. Appellant "started getting mad." Because he was "creeping [her] out," Jessica cursed at him. Appellant then said, "I know you were the one. You always been the one." Jessica "freaked out." She was already dialing 911 when he ran off.

This evidence supports that appellant communicated a threat to Jessica's safety, and that Jessica reasonably experienced fear from that threat. Appellant refused to leave, approached to within four steps of Jessica, became angry, and uttered the words: "I know you were the one. You always been the one." In context, it takes little imagination to infer that appellant intended to, and did, communicate a threat to Jessica's safety–a threat to assault her or perhaps try to abduct her to satisfy his obsession with her, given that she was not cooperating in his fantasy. Moreover, Jessica quite reasonably experienced fear from appellant's conduct and words. Further, this incident occurred approximately two weeks before the burglary. Thus, appellant had ample "opportunity to reflect and to renew his . . . intent before [the burglary], thereby aggravating the violation of public security or policy already undertaken." (*Gaio, supra,* 81 Cal.App.4th at p. 935.) For these reasons, we conclude substantial evidence supports the trial court's determination that the stalking was complete before the burglary, and that it was an independent criminal act subject to separate punishment under section 654.

II. *Remand*

The trial court enhanced appellant's sentence by five years for his prior serious felony conviction under section 667, subdivision (a). Appellant contends that he is entitled to a remand for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. We agree.

Effective January 1, 2019 (after defendant's sentencing), Senate Bill No. 1393 deleted former subdivision (b) of section 1385, which precluded the trial court from striking the five-year enhancements for defendant's prior serious felony convictions under section 667, subdivision (a). With the deletion of subdivision (b) of section 1385, the trial court now has such discretion. Defendant's case is not final on appeal, and therefore he is entitled to the ameliorative effect of the enactment. Further, a remand is appropriate. In the analogous situation involving the enactment of Senate Bill No. 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) Here, the record contains no

clear indication of the trial court's intent. Therefore, a remand is appropriate.

DISPOSITION

The matter is remanded for the trial court, at a proceeding at which defendant is present and represented by counsel (unless waived), to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.